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REASONABLE EXPECTATIONS APPROACH TO INSURANCE CONTRACT INTERPRETATION MODIFIED IN MISSOURI

*Estrin Construction Co. v. Aetna Casualty & Surety Co.*¹

Estrin was hired as a general contractor to build a warehouse according to the specifications of architect Morris. It subcontracted with Keystone Masonry for the steel and masonry work on the walls. It insured against builders risk with Home Insurance (Home) and against general liability with Aetna Casualty and Surety Company (Aetna). During construction, heavy winds collapsed portions of the walls. Estrin submitted a claim for damages to Home, which paid \$26,500. Home then sued architect Morris and subcontractor Keystone to recover the amount paid, asserting its rights as subrogee under the builders risk policy.²

Morris impleaded Estrin based on an indemnification clause in their contract. Estrin tendered its defense to Aetna, which denied coverage and refused to defend. Estrin hired private counsel, successfully defended the suit, and then sued Aetna to recover the costs of the defense plus the statutory penalty for vexatious nonpayment.³

The issue at trial was whether two exclusions in the comprehensive liability policy precluded Estrin's cause of action. One exclusion exempted from coverage damage caused by accident if the insured or an indemnitee was an architect.⁴ The other exclusion exempted "property owned or occupied by . . . the Insured" or in the "care, custody, or control of the Insured."⁵ The trial court found these provisions to be unambiguous and not subject to construction.⁶ The court then found that Morris, the indemnitee, was an architect within the meaning of the indemnitee exclusion and that, at the

1. 612 S.W.2d 413 (Mo. App., W.D. 1981).

2. *Id.* at 415.

3. *Id.* See MO. REV. STAT. § 375.420 (1978 & Cum. Supp. 1981) (10 or 20% increase in damages).

4. The full exclusion provides as follows:

This endorsement does not apply:

(a) if the Insured or indemnitee is an architect [and] injury . . . or destruction aris[es] out of defects in maps, plans, designs or specifications prepared, acquired or used by the Insured or indemnitees.

612 S.W.2d at 415 (brackets in original).

5. *Id.*

6. The trial court followed the traditional plain meaning approach to insurance contract interpretation. See notes 16-20 and accompanying text *infra*.

time of the accident, Estrin occupied and controlled the damaged property. Therefore, the exclusions precluded Estrin's cause of action.⁷

On appeal to the Missouri Court of Appeals for the Western District, Estrin asserted that the policy exclusions were ambiguous, requiring application of the rule of insurance contract construction that favors coverage over exclusion.⁸ Aetna countered that the policy provision was unambiguous and not subject to construction.⁹ The court of appeals affirmed, holding that Aetna was excluded from defense of the third party petition on the basis of the "care, custody, or control" exclusion,¹⁰ but not by the indemnitee exclusion.¹¹ The decision to relieve Aetna of liability comports with Missouri case law,¹² but in reaching this result, the court modified Missouri's version of the reasonable expectations approach to insurance contract interpretation.¹³

There are three major approaches to the interpretation of contracts. The first, the plain meaning rule, and its converse, the reasonable interpretations rule, effect the intent of the parties as evidenced by their agreement, the written contract.¹⁴ The other two approaches, judicial construction and unconscionability, are aimed at fairness.¹⁵

The plain meaning rule searches for ambiguity in the agreement.¹⁶ Underlying this approach is the belief that courts should not interfere with

7. 612 S.W.2d at 415-16.

8. This rule is based on the general policy that courts abhor forfeitures. A contrary rule would work forfeitures because the purpose of the insurance contract, compensation of the insured, would be defeated. *A New Approach For the Interpretation of Insurance Contracts*, 17 WAKE FOREST L. REV. 140, 143 & n.28 (1981). Missouri courts generally interpret contracts in light of their purpose. *See, e.g.,* Wilshire Constr. Co. v. Union Elec. Co., 463 S.W.2d 903, 906 (Mo. 1971).

9. 612 S.W.2d at 417. This is the plain meaning rule. *See* notes 16-20 and accompanying text *infra*.

10. 612 S.W.2d at 429.

11. *Id.* at 416. The court explained that the duty of the insurer to defend depends on whether the allegations of the petition state a claim within the policy coverage. *Id.* (citing Zipkin v. Freeman, 436 S.W.2d 753, 754 (Mo. En Banc 1969)). Count one of the third party petition alleged negligence on the part of the architect, something that did not fall within the indemnitee exclusion. Aetna was thus not excused from the defense under that exclusion. *Id.*

12. Moore v. M.F.A. Mut. Ins. Co., 422 S.W.2d 357, 359 (Mo. App., K.C. 1967); Northwestern Mut. Ins. Co. v. Haglund, 387 S.W.2d 230, 233-34 (Mo. App., K.C. 1965).

13. *See generally* Perlet, *The Insurance Contract and the Doctrine of Reasonable Expectation*, 6 FORUM 116 (1971).

14. *See* 17 WAKE FOREST L. REV., *supra* note 8, at 143.

15. *See* U.C.C. § 2-302 comment 1 (purpose of unconscionability doctrine is prevention of oppression and unfair surprise); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 562 (1971) (courts strain to construe contracts when they find unfair term).

16. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 3-9 (1977); *Insurance Contracts: Diverse Judicial Approaches for Determining Ambiguity in Missouri*, 46

contracts made by private parties.¹⁷ If the provision in question is unambiguous, extrinsic evidence to interpret the contract is inadmissible in the absence of fraud,¹⁸ duress,¹⁹ or mutual mistake.²⁰ The court must apply the terms as written. The reasonable interpretations approach, on the other hand, is founded on the belief that if contract language is ambiguous, courts must intervene to determine the parties' intent.²¹ If the language is reasonably susceptible to more than one meaning, it is subject to construction. Extrinsic evidence may be admitted to help determine the intent of the parties,²² and the court interprets the terms in light of that evidence.

With the advent of standard form and adhesion contracts, the second major approach to contract interpretation emerged: judicial construction. This doctrine is result-oriented;²³ if the court determines that a contract provision is unfair, it finds the provision to be ambiguous and subject to construction.²⁴ Many commentators have criticized this doctrine because it chooses a result without regard to the words used by the parties.²⁵

Under both the reasonable interpretations approach and the judicial construction doctrine, the court will apply rules of construction, which usually favor the insured, to ambiguous terms. These rules are based on the policy

MO. L. REV. 447, 450 & nn.12-14 (1981). To determine whether a contract is ambiguous, the disputed language will be examined in the context of the entire agreement. It is ambiguous if it is reasonably susceptible of more than one construction when the words are given their plain and ordinary meanings. *Universal Towing Co. v. United Barge Co.*, 579 F.2d 1098, 1101 (8th Cir. 1978).

17. See *H.K. Porter Co. v. Wire Rope Corp.*, 367 F.2d 653, 660 (8th Cir. 1966); 17 WAKE FOREST L. REV., *supra* note 8, at 143.

18. See *Hudspeth v. Zorn*, 292 S.W.2d 271, 275-76 (Mo. 1956).

19. See *Aurora Bank v. Hamlin*, 609 S.W.2d 486, 488 (Mo. App., S.D. 1980).

20. See *Czarnecki v. Phillips Pipe Line Co.*, 524 S.W.2d 153, 156-57 (Mo. App., St. L. 1975).

21. See *Kyte v. Fireman's Fund Am. Ins. Cos.*, 549 S.W.2d 366, 367-68 (Mo. App., Spr. 1977); 46 MO. L. REV., *supra* note 16, at 451 & nn.15-16.

22. The reasonable interpretations approach is an attempt to reconcile the strict plain meaning rule with the rules of construction that favor the insured; it tries to balance contract language against fairness to the parties. See 46 MO. L. REV., *supra* note 16, at 451 & nn.15-16; 17 WAKE FOREST L. REV., *supra* note 8, at 143.

23. Slawson, *supra* note 15, at 562.

24. Ambiguity in this context can be defined as a lack of notice to the weaker party that the contract favors the drafter and is, therefore, unfair. Kamarck, *Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153, 159 (1977).

25. Slawson, *supra* note 15, at 562. Professor Keeton does not favor judicial construction because it creates confusion and implies that the courts are prejudiced against insurers. Keeton, *Insurance Law Rights At Variance with Policy Provisions*, 83 HARV. L. REV. 961, 972 (1970). See also Llewellyn, Book Review, 52 HARV. L. REV. 700, 700-05 (1939).

that contracts should be construed in favor of the party who had little or no opportunity to choose the terms of the contract.²⁶ They are recognized in the majority of jurisdictions.²⁷

The third major approach to contract interpretation, unconscionability, also dictates a result based on fairness. Both the Uniform Commercial Code²⁸ and the Restatement (Second) of Contracts²⁹ use unconscionability. The doctrine allows courts to police contracts and refuse to enforce terms that they find unfair.³⁰ This approach is preferable to the judicial construction doctrine because it allows the courts to attack the problem directly, without using the pretense of construction.³¹

These traditional approaches are abandoned by the *Estrin* court. Judge Shangler, writing for the court, modified Missouri's implementation of the reasonable expectations doctrine. About one-third of the states recognize this doctrine, but the majority, which prior to *Estrin* included Missouri,³²

26. One commentator suggests, however, that rules of construction in favor of the insured should be applied only if the ambiguous contract term is unfair. A term is unfair if it defeats the reasonable expectations of a party because the protection of expectations induced by agreements is the purpose of contract law. 3 A. CORBIN, CONTRACTS § 559 (1960).

27. 46 MO. L. REV., *supra* note 16, at 448 n.6. See generally 3 A. CORBIN, *supra* note 26, § 559.

28. U.C.C. § 2-302 provides:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

29. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) provides: If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Id. comment a provides, "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect."

30. For cases applying U.C.C. § 2-302, see generally 2 U.C.C. CASE DIGEST §§ 2302.1-.34 (1979).

31. See RESTATEMENT (SECOND) OF CONTRACTS § 208 comment a (1981) ("Particularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation.").

32. See *Bennett v. American Life & Accident Ins. Co.*, 495 S.W.2d 753, 758 (Mo. App., St. L. 1973).

requires ambiguity before the doctrine may be applied.³³ By not requiring ambiguity, *Estrin* marks a repudiation of the majority approach.

The reasonable expectations doctrine is based on the adhesive nature of insurance contracts.³⁴ The court recognizes that adhesion contracts are not per se unenforceable because they permit lower transaction costs in a mass consumer society.³⁵ The need for them, however, does not change their adhesive nature, and they should be subject to rigorous scrutiny. Adhesion contracts are not the result of negotiations between equals. One party makes the terms and the other adheres to them with little or no choice.³⁶ The reasonable expectations of parties in this unequal bargaining position must be honored to ensure that enforcement is consistent with the adherent's intent. Courts must determine this intent from the circumstances of the transaction, even if the written words of the contract are not ambiguous.³⁷

As the *Estrin* court explained, the reasonable expectations approach focuses on the expectations of a reasonable person in the place of the adherent.³⁸ It is an objective standard that does not guarantee construction in favor of the insured.³⁹ In applying this standard, courts may consider any extrinsic evidence that may help them to determine the reasonable expectations of the parties: ambiguity of the language, general knowledge of con-

33. *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts*, 13 J.L. REFORM 603, 609 n.22, 611 n.29 (1980). For the historical development of the reasonable expectations approach, see Perlet, *supra* note 13, at 117.

34. For a general discussion of adhesion contracts in this setting, see 612 S.W.2d at 418 n.3.

35. *Id.* at 422. One commentator notes that individualized contracts would not be beneficial to the consumer because he would have to pay to have the contract negotiated. The benefits obtained can be acquired less expensively. Slawson, *supra* note 15, at 531.

36. 612 S.W.2d at 422.

37. *Id.* at 421. As authority for this proposition, the court cites, but does not discuss, a leading decision that explains the doctrine of reasonable expectations, *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975). In *C & J Fertilizer*, the plaintiff's plant was burglarized. The plaintiff was insured by the defendant under two policies, both of which required visible marks of entry before a claim for stolen property would be paid. No visible marks within the meaning of the policy were found at the plaintiff's plant, although the door of the building had been forced open. *Id.* at 171. The plaintiff sued to recover the amount lost in the burglary. The Supreme Court of Iowa held that the plaintiff could not reasonably expect the exclusion of property taken by actual burglary from coverage in a theft policy. *Id.* at 176-77. This case illustrates the necessity of determining the intent of the parties before construing a contract and the danger in applying the plain meaning rule, which can frustrate the intent of the parties.

38. 612 S.W.2d at 423.

39. *Id.* at 420. See, e.g., *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 444-49 (Iowa 1970) (reasonable person would have understood policy to exclude coverage).

tent, and whether the policyholder read or had the opportunity to read the language.⁴⁰ If the court finds that the term does not meet the expectations of a reasonable person in the position of the insured, it is unfair and subject to corrective judicial power.⁴¹

In applying this standard, the *Estrin* court looked to the reasonable expectations of the usual general contractor because the plaintiff was a member of this class.⁴² The court then used comment f of section 211 of the Restatement (Second) of Contracts⁴³ as its test for unfairness and found that the Aetna provision was not unfair.⁴⁴

The court next recognized that the term still could be unfair if it eliminated the dominant purpose of the contract.⁴⁵ The court found that in policies like Aetna's, it is reasonably expected that the property and person of the insured are not protected, since the dominant purpose is to protect others against loss.⁴⁶ Therefore, the exclusion did not impair the dominant purpose of the contract. Further, the court found that the walls under construction were in the "care, custody or control" of Estrin when the damage occurred.⁴⁷ The property damage was excluded from coverage under the

40. 612 S.W.2d at 426.

41. *Id.*

42. *Id.* at 427.

43. RESTATEMENT (SECOND) OF CONTRACTS § 211 comment f (1981), provides:

A party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred . . . from the fact that it eviscerates the nonstandard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction.

Keeton advocates an approach similar to that of the Restatement (Second) of Contracts. *See Keeton, supra* note 25, at 968. This approach is not unfair to insurers because they know that policyholders ordinarily will not read their policies, probably because of the complicated language. It is unfair to give effect to a harsh clause, no matter how plain and clear the language, because the policyholder usually makes the contract before he even has a chance to see it. *Id.* Keeton also suggests that insurance companies may make an explicit term effective if they call it to the attention of the policyholder. He bases this idea on an analogy to the limitations on innkeeper liability. *Id.*

44. The court here equates an *expected* term with a *fair* one. In this view, an unexpected term is unreasonable and, therefore, unfair. 612 S.W.2d at 426.

45. RESTATEMENT (SECOND) OF CONTRACTS § 211 comment f (1981).

46. 612 S.W.2d at 427.

47. In applying this clause to the facts, the court interpreted "control" to mean physical control, i.e., possessory rather than proprietary control. Relying on *Kirchner v. Hartford Accident & Indem. Co.*, 440 S.W.2d 751, 755 (Mo. App., K.C. 1969), the court also required physical control at the time the loss occurred. 612 S.W.2d at 428-29. These are standard interpretations of the care, custody, or con-

Aetna policy.⁴⁸

The supreme court's adoption of the *Estrin* approach to adhesion contracts could have far-reaching effects on the law in Missouri because adhesion contracts are widely used.⁴⁹ Although the reasonable expectations doctrine may be an aid to Missouri courts,⁵⁰ perhaps those courts should revise the more traditional unconscionability approach,⁵¹ rather than adopt a new approach in an already confused area of the law. In the area of insurance contract interpretation, it is difficult to be certain which approach a court will use in analyzing a contract.⁵² Similarly, legal scholars are in disagreement about which approach to use.⁵³ The law of contract interpretation is in a state of confusion, and the adoption of a new approach may only add further unpredictability.⁵⁴

trol clause. See Annot., 62 A.L.R.2d 1242, 1243-51 (1958).

Although the court relied on *Kirchner* to interpret the clause, it distinguished that case on the basis of the relationship between the builder and the damaged property. 612 S.W.2d at 428. In *Kirchner*, the insured was a subcontractor who had little control of the construction process; the court found that he lacked the necessary control of the property. 440 S.W.2d at 757. By contrast, *Estrin* was a general contractor who was required by contract to supervise the job and to protect the property during construction. The court also found that *Estrin* had control at the time the damage occurred because the contract vested responsibility for the project in him. Such responsibility was "tantamount to a right of possession until the construction was completed." 612 S.W.2d at 429.

48. 612 S.W.2d at 429.

49. A. CORBIN, *supra* note 26, § 559 (Supp. 1980). The fate of insurance contract interpretation may suggest the future of all adhesion contracts. Holmes, *Is There Life After Gilmore's Death of Contract?—Inductions From a Study of Commercial Good Faith in First-Party Insurance Contracts*, 65 CORNELL L. REV. 330, 345 (1980).

50. Some commentators do favor the reasonable expectations approach. See Kamarck, *supra* note 24, at 159-65. See generally Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275 (1976). Others believe that the doctrine can be beneficial if applied only in cases where ambiguity has been found. See generally Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); 13 J.L. REFORM, *supra* note 33.

51. For a discussion of unconscionability in insurance contract interpretation, see Anderson, *Life Insurance Conditional Receipts and Judicial Intervention*, 63 MARQ. L. REV. 593, 603-04 (1980).

52. See generally 46 MO. L. REV., *supra* note 16.

53. *Id.* at 449 n.11.

54. See generally Squires, *A Skeptical Look at the Doctrine of Reasonable Expectations*, 6 FORUM 252 (1971). It should also be noted that reasonable expectations may overlap with unconscionability. One purpose of U.C.C. § 2-302 is to prevent unfair surprise. A term is not unfairly surprising if the party reasonably should have known and understood it. Comment, *Bargaining Power and Unconscionability: A Suggested Approach to UCC Section 2-302*, 114 U. PA. L. REV. 998, 999 (1966). This analysis does not differ greatly from that of the reasonable expectations test, although an objective standard may be applied more readily in the latter case.

Moreover, any new approach should be both clearly formulated and easy to apply.⁵⁵ Unfortunately, the reasonable expectations doctrine may not be a judicially manageable approach. Professor Keeton, who strongly advocates the doctrine, concedes that it is "too general to serve as a guide from which particularized decisions can be derived through an exercise of logic, and too broad to be universally true"⁵⁶ This vagueness is apparent in *Estrin*. The guidelines articulated by the court are contradictory. For example, the court states that it must look at the reasonable expectations of the mass of adherents to a particular contract.⁵⁷ Yet, in applying this objective standard, the court properly may consider whether the insured in a particular case has read the policy language. These statements are inconsistent; one disregards the subjective expectations of the particular policyholder while the other takes his subjective knowledge into account.⁵⁸ Surely the subjective knowledge of the particular policyholder has no bearing on the reasonable expectations of the mass of adherents. It seems that the criteria for applying the doctrine must be clarified if it is to be workable. The absence of such a clear exposition may lead to unclear and inconsistent judicial opinions.⁵⁹

If the Missouri courts wish to adopt a new approach to insurance contract interpretation, it seems preferable to revise the doctrine of unconscionability. This approach is alluded to by Judge Shangler in his dissenting opinion in *Funding Systems Leasing Corp. v. King Louie International, Inc.*⁶⁰ As he explained in that case, the current unconscionability doctrine in Missouri has two prongs, one procedural and one substantive. Procedural unconscionability refers to abuse in the contract formation process and focuses on high pressure salesmanship, fine print, misrepresentation, and unequal bargaining power.⁶¹ Substantive unconscionability refers to the resulting harsh and unreasonable terms of the contract.⁶²

Because a contract must be *both* substantively and procedurally unconscionable before a court will declare a term unconscionable,⁶³ the doctrine usually is limited to cases in which one party is clearly in a stronger bargaining position.⁶⁴ Unconscionability, therefore, does not apply to many business

55. Comment, *supra* note 54, at 999.

56. Keeton, *supra* note 25, at 967.

57. 612 S.W.2d at 426.

58. For a discussion of the difficulty involved in applying the reasonable expectations doctrine, see Squires, *supra* note 54, at 252.

59. See Kelso, *Idaho and the Doctrine of Reasonable Expectations: A Springboard for an Analysis of a New Approach to a Valuable But Often Misunderstood Doctrine*, 47 INS. COUNS. J. 325, 330 (1980).

60. 597 S.W.2d 624 (Mo. App., W.D. 1979).

61. *Id.* at 648 (Shangler, J., dissenting). See Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489-508 (1967).

62. 597 S.W.2d at 648.

63. *Id.* It should be noted that a sliding scale is used when applying the two prongs. If the terms created by the contract are *very* oppressive, then the contract process need be only slightly abusive. *Id.* at 634.

64. See e.g., *Funding Systems Leasing Corp. v. King Louie Int'l, Inc.*, 597

transactions between parties of equal sophistication. Nonetheless, these contracts still may be unfair because the adherent, as in *Estrin*, may have little or no choice but to accept the terms offered.⁶⁵ Although the *Estrin* plaintiff could have rejected Aetna's terms and insured with another company, the standard form terms probably would have been the same. Unconscionability, however, could not be applied in *Estrin*, even if the terms were unfair, because there was no procedural unconscionability. To remedy this situation, Missouri courts need only abandon the procedural prong of the unconscionability doctrine.⁶⁶ Courts could then focus on whether the contract was harsh or unreasonable in light of all the surrounding circumstances.⁶⁷ This would be a more equitable and predictable approach to the interpretation of insurance contracts.⁶⁸

The *Estrin* court's advocacy of the reasonable expectations approach is an attempt to establish a fair approach to insurance contract interpretation. Unfortunately, the vague nature of this doctrine may cause further confusion. It would be advisable for the Missouri courts to focus on the improvement of an existing doctrine, unconscionability, to reconcile the public's need for adhesion contracts, the inherent unfairness of such contracts, and the intent of the parties.

NANCY E. MATTEUZZI

S.W.2d 624 (Mo. App., W.D. 1979); *USA Chem, Inc. v. Lewis*, 557 S.W.2d 15 (Mo. App., K.C. 1977).

65. 597 S.W.2d at 648.

66. One commentator suggests that the abandonment of the procedural aspect of unconscionability would help to clarify the application of U.C.C. § 2-302. See Leff, *supra* note 61, at 496.

67. This is basically the approach that Judge Shangler takes in *Estrin*. He seems to use the term "reasonable expectations" as a disguise for substantive unconscionability. It is interesting to note that when using the term "substantive unconscionability," he was forced to write a dissenting opinion, see 597 S.W.2d at 624 (Shangler, J., dissenting), yet when using the term "reasonable expectations," he received unanimous support, see 612 S.W.2d at 413.

68. This approach also would harmonize the application of U.C.C. § 2-302 with the intent of Karl Llewellyn, one of the Code's draftsmen. See Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 938-39 (1969). Llewellyn believed that each form contract represented two separate contracts. One contained the "dickered" terms, while the other contained the boilerplate terms supplied by the drafter. In Llewellyn's view, any unreasonable or surprising terms found in the boilerplate were not part of the overall contract; such terms were enforceable only if reasonable. *Id.* Procedural unconscionability, in this view, is unnecessary in order to invalidate an unreasonable term. The elimination of the procedural unconscionability requirement also seems consistent with the stated purpose of U.C.C. § 2-302: prevention of oppression and unfair surprise. Oppression may be interpreted to include terms with oppressive effects, regardless of procedural abuses. Spanogle, *supra*, at 948. For a discussion of unfair surprise, see note 54 *supra*.